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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

HARRY R. ALSTON,
Plaintiff in Error,

v.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 898

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ADVANCE

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MOTION TO ADVANCE

Comes now, Harry R. Alston, the plaintiff in the above entitled cause, and respectfully moves this Honorable Court to advance the hearing of the above entitled cause, to the end that the question certified may be answered before the adjournment of the October Term, 1926, for the reasons following, to-wit:

FIRST

That on the second day of December, 1924, the Grand Jurors of the United States for the Southern District of Iowa, Central Division, returned into the

United States District Court, at Des Moines, Iowa, a certain indictment, in three counts, against said Harry R. Alston, charging that he did unlawfully, willfully and feloniously purchase opium, morphine and cocaine in and from certain packages, which said packages were not then and there the original stamped packages, and did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said Act as amended. Contrary, etc., to which charges the said Harry R. Alston, in person and without counsel, entered a plea of guilty.

SECOND

That thereafter, on the twenty-ninth day of December, 1924, in said United States District Court, at Des Moines, Iowa, before the Honorable Martin J. Wade, District Judge, the said Harry R. Alston was sentenced to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years, under count one of the indictment; for a term of four years under count two of the indictment, and for a term of three years under count three of the indictment. The sentences imposed under counts two and three to run concurrently with the sentence imposed under count one of said indictment, and that he pay the costs of such prosecution, and committed accordingly.

THIRD

That thereafter, and within six months from and after said judgment and sentence, the Honorable William S. Kenyon, Circuit Judge, allowed a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, and issued a citation, which citation was duly served, and the Transcript of Record filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, whereupon the said Harry R. Alston was allowed to prosecute said case as a poor person, and admitted to bail in the sum of $5,000, and required to enter into a recognizance, with good and sufficient sureties, which the said Harry R. Alston was unable to furnish.

FOURTH

That said cause was duly submitted on briefs in the said United States Circuit Court of Appeals for the Eighth Circuit, and taken under advisement.

FIFTH

That thereafter, on the ....day of November, 1926, the Honorable Kimbrough Stone, Circuit Judge the Honorable Arba S. Van Valkenburgh, Circuit Judge and the Honorable Wilbur F. Booth, Circuit Judge, being the three judges who sat in the said United States Circuit Court of Appeals for the Eighth Circuit when said cause was submitted, sent the following certified question to the Supreme Court of the United States (omitting statement of the case required by Rule 34 and signatures) in words and figures as follows, to-wit:

"Are the Acts of December 17, 1914 (38 Stat. 785), *of February* 24, 1919 (40 Stat. 1057, 1130, Sec. 1006), *and November* 23, 1921 (42 Stat. 227, 298, Sec. 1005), *declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments, as being within the power delegated to the Congress by the Constitution of the United States?"*

SIXTH

That the United States Circuit Court of Appeals for the Eighth Circuit has denied the "Application for Reduction of Bond and Release on his own Recognizance," during the pendency of a final decision in this case.

SEVENTH

That unless this cause is advanced for hearing, and this Honorable Court will answer the certified question without delay, the said Harry R. Alston will have, with allowance for good conduct, served the entire sentence of four years before a final decision will be made in said cause, and the writ of error will avail him nothing.

EIGHTH

That Section 8 of Article I of the Constitution of the United States provides that "The Congress shall have power to lay and collect taxes, duties, imposts and excises," but that such power is limited to those who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, and who fail to register and

pay the prescribed tax, under Act of December 17, 1914, and does not apply to the plaintiff in error, who is neither required to register nor pay such special tax.

NINTH

That the Acts of February 24, 1919, and November 23, 1921, while declaring it to be unlawful to "purchase" such narcotic drugs, fails to prescribe any penalty upon the "purchaser."

TENTH

That the Acts of February 24, 1919, and November 23, 1921, respectively, insofar as they attempt to make it unlawful to purchase such narcotic drugs, and to punish the "purchaser" are contrary to and in violation of the Tenth Amendment to the Constitution of the United States, being a matter within the reserved powers of the states.

ELEVENTH

That in cases of *United States v. Doremus*, 249 U. S. 86, and *Webb v. United States*, 249 U. S. 96, this Honorable Court upheld the validity of the Act of December 17, 1914, as a revenue measure, Mr. Chief Justice White, Mr. Justice McKenna, Mr. Justice Van Deventer and Mr. Justice McReynolds dissented, because they were of the opinion that the Act of Congress, insofar as it embraced the matters complained of, were beyond the constitutional power of Congress to enact, being within the reserved powers of the States. Our Mr. Lindquist filed a petition for a rehearing and brief as *amicus curiae*, respectively, in said causes.

TWELFTH

That in the case of *Linder v. United States,* 268 U. S. 5, Your Honors, although laying down the rule that "Congress cannot, under the pretext of executing delegated power, enact laws for the accomplishment of objects not entrusted to the Federal Government, and any provisions of an Act of Congress, ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the powers reserved to the States, is invalid and unenforceable." Your Honors did not say whether the Act is constitutional or unconstitutional, all of which caused Your Honors to suggest, in case of *United States v. Daugherty,* 269 U. S. 360, that it may necessitate a review of that question if hereafter properly presented.

We respectfully submit that the question is fairly presented in this case.

Wherefore, the plaintiff in error, prays that the certified question be answered in the negative.

JOHN B. BODDIE,
FRANS E. LINDQUIST,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

NO. 393.

HARRY K. ALSTON, *Plaintiff in Error*,

vs.

UNITED STATES OF AMERICA, *Defendant in Error*.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE, ASSIGNMENTS OF ERROR, CERTIFIED QUESTION, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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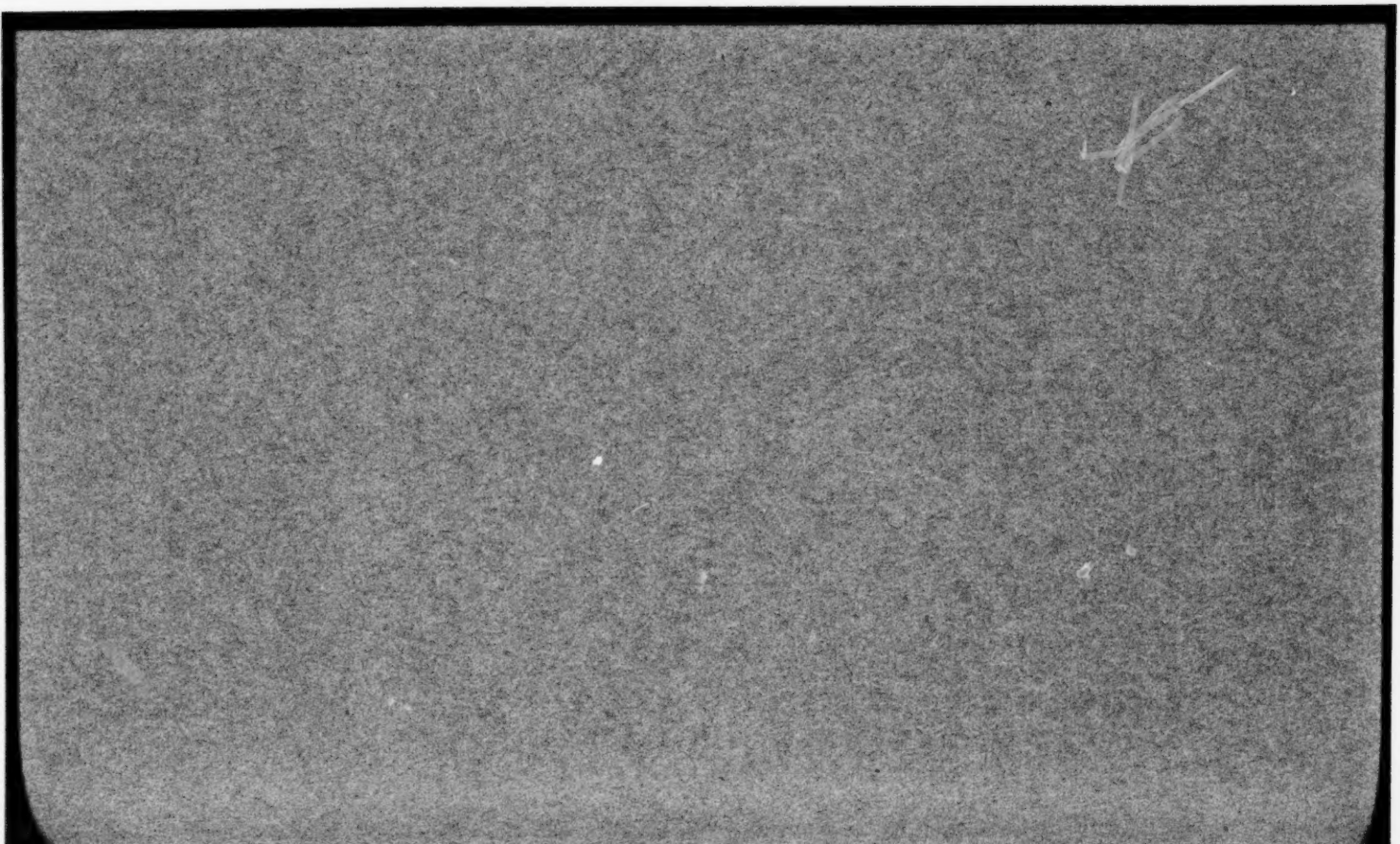

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

NO. 898.

HARRY R. ALSTON, *Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA, *Defendant in Error.*

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE, ASSIGNMENTS OF ERROR, CERTIFIED QUESTION, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

December 2, 1924, the Grand Jurors of the United States for the Southern District of Iowa, Central Division, returned into the United States District Court at Des Moines, Iowa, a certain indictment, in three counts, against the above named Plaintiff in Error, entitled, "United States of America, Plaintiff, vs. Harry R. Alston, Defendant, No. 3218 Criminal." (Rec. .)

The first count of said indictment charges that said Harry R. Alston, on or about the 24th day of July, 1924, in the City of Des Moines, County of Polk, State of Iowa, did unlawfully, wilfully and feloniously *purchase opium*, and a

derivative and preparation thereof, to-wit, morphine, from a person or persons to the grand jury unknown, said morphine being in and from certain packages, which said packages were not then and there the original stamped packages containing said morphine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said Act, as amended, contrary, etc.

The second count, in the same language, charges that on the 6th day of October, 1924, at Des Moines, said Harry R. Alston did unlawfully, wilfully and feloniously *purchase opium*, and a derivative and preparation thereof, to-wit, morphine.

The third count, in the same language, charges that on the 6th day of October, 1294, at Des Moines, said Harry R. Alston did unlawfully, wilfully and feloniously *purchase coca leaves* and a derivative and preparation thereof, to-wit, cocaine.

December 2, 1924, in the said United States District Court, before the Honorable Martin J. Wade, District Judge, upon being arraigned upon said indictment, in his own proper person and without counsel, the said Harry R. Alston entered a plea of guilty as charged on said indictment.

December 29, 1924, the said Harry R. Alston was sentenced, on such plea of guilty, to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one of the indictment; for a term of four years under count two of said indictment, and for a term of four years under count three of the indictment, the sentences imposed under counts two and three to run concurrently with the sentence imposed under count one, and that he pay the costs of such prosecution. (Rec. .)

That thereafter, and within six months from and after

such judgment and sentence, the said Harry R. Alston, through his attorneys, Messrs. John B. Boddie and Frans E. Lindquist, filed in the office of the Clerk of said United States District Court, at Des Moines, a Petition for a Writ of Error and Assignments of Error, respectively, upon consideration of which the HONORABLE WILLIAM S. KENYON, Circuit Judge, allowed a Writ of Error from the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, and issued a Citation, which Citation was duly served and filed, and that thereafter the Clerk of said District Court transmitted to the Clerk of said Court of Appeals a Transcript of the Record. (Rec. .)

That thereafter, by leave of said Court of Appeals, the Plaintiff in Error was permitted to file Amended Assignments of Error, assigning the following errors, to-wit:

1.

That said counts one, two and three of said indictment are based on section 1 of Acts of February 24, 1919, and November 23, 1921, being 40 Stat. 1130 and 42 Stat. 299, respectively, making it unlawful for any person to "purchase" any opium, or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in original stamped package or from the original stamped package, such "purchase" not being prohibited by the original Act of December 17, 1914 (commonly known as the Harrison Anti-Narcotic Act), 38 Stat. 785, but that the said Acts of February 24, 1919, and November 23, 1921, respectively, attempting to make it unlawful to "purchase" any such drugs, fixes no penalty for violation thereof.

2.

That the original Act of December 17, 1914, 38 Stat. 785, fixing the punishment for violations of said Act, can not apply to the "purchase" of such drugs, first attempted to be made unlawful by the said Acts of February 24, 1919, and November 23, 1921, as aforesaid.

3.

That the first, second and third counts of said indictment, to which the Plaintiff in Error entered a plea of guilty as charged, do not state facts sufficient to constitute any crime against the laws of the United States of which the United States District Court for the Southern District of Iowa, Central Division, has any jurisdiction, and is violative of the Sixth Amendment to the Constitution of the United States, in that said counts do not inform the Plaintiff in Error of the nature and cause of accusation against him.

4.

That the said Acts of February 24, 1919, and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is violative of the Tenth Amendment to the Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by it to the States, but such power is reserved to the States respectively and to the people.

5.

That as the "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919, and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, on every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919 and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, can not be upheld as a revenue measure.

6.

That by reason of the failure of Congress to fix any pun-

ishment for the "purchase" of such drugs, upon the "purchaser," the United States District Court for the Southern District of Iowa, Central Division, had no power or jurisdiction to impose the judgment and sentence upon the Plaintiff in Error that he be confined in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one of the indictment; for a term of four years under count two of the indictment, and for a term of four years under count three of the indictment, the sentences imposed under counts two and three to run concurrently with the sentence imposed under count one of said indictment, and that he pay the costs of the prosecution, and such sentences are null and void, for want of jurisdiction, and the Plaintiff in Error is detained, restrained and deprived of his liberty without due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

That thereafter, on the —— day of November, 1926, the Honorable Kimbrough Stone, the Honorable Arba S. Van Valkenburgh, and the Honorable Wilbur F. Booth, Circuit Judges, being the Judges who sat in the United States Circuit Court of Appeals for the Eighth Circuit on the hearing of said cause, prepared and transmitted to this Honorable Court the following certified question, to-wit: (Page 6-8

That thereafter, the Plaintiff in Error filed his application for reduction of bail and for release on his own recognizance, which application was by the United States, Circuit Court of Appeals denied. (Rec. .)

That thereafter, on the 7th day of March, 1927, the motion to advance was by this Court sustained; the Plaintiff in Error was permitted to prosecute his case as a poor person; the case was set for argument on April 11, 1927, the said Circuit Court of Appeals directed to transmit a certified copy of the entire record.

United States Circuit Court of Appeals.
Eighth Circuit.
No. 7122—September Term, A. D. 1926.

Harry R. Alston, Plaintiff in Error, vs. United States of America, Defendant in Error.	In Error to the District Court of the United States for the Southern District of Iowa.

Messrs. John B. Boddie and Frans E. Linquist for Plaintiff in Error.

Hon. Ross R. Mowry, United States Attorney, Mr. Ray C. Fountain, Assistant United States Attorney, and Mr. Frank F. Wilson, Assistant United States Attorney, for Defendant in Error.

Before Stone, Van Valkenburgh and Booth, Circuit Judges.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

That the second day of December, 1924, an indictment was returned charging Harry R. Alston with a violation of the Act of December 17, 1914 (38 Stat. 785), as amended by the Acts of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006), and of November 23, 1921 (42 Stat. 227, 298, sec. 1005), in that he had purchased morphine (a derivative of opium) and cocaine (a derivative of coca leaves) in packages not bearing and having affixed appropriate tax paid stamps as required by the Act as thus amended.

To that indictment, Alston entered a plea of guilty upon which he was adjudged guilty and sentenced to imprisonment for a term of four years

Within due time thereafter, Alston sued out a Writ of Error from the above judgment. Among the Assignments of Errors are the following:

"Fourth.

That the said Acts of February 24, 1919, and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is violative of the Tenth Amendment to the Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by its (it) to the States, but such power is reserved to the States respectively and to the people.

"Fifth.

That the "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919 and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, upon every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919, and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, can not be upheld as a revenue measure."

Plaintiff in error presents to this Court the contention that the Congress was without Constitutional authority to enact the above legislation making the purchase of the designated narcotics unlawful. The basis of this contention is that such a prohibition is an exercise of police power; that such character of power is vested in the several States exclusively by the Constitution of the United States; and that the above enactments can not be sustained as an exercise of the revenue power of the National Government because they are not revenue measures but are purely police measures.

This Court has, in numerous cases heretofore, proceeded upon the assumption that the validity of the above Congressional enactments had been sustained by the Supreme Court. However, in the recent case of United States vs. Daugherty, (269 U. S. 360) the Court makes use of the language following:

"The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in United States vs. Doremus, 249 U. S., 86, was not raised below and has not been again considered. The doctrine approved in Hammer vs. Dagenhart, 247 U. S., 251; Child Labor Tax Case, 259 U. S., 20; Hill vs. Wallace, 259 U. S., 44, 67; and Linder vs. United States, 268 U. S., 5, may necessitate a review of that question if hereafter properly presented."

In view of the above expression of the Supreme Court, this Court is doubtful of its duty and desires the instruction of the Supreme Court upon the following question, a decision of which is indispensable to a determination of this case before it and to the proper discharge of its duties herein.

Question I. Are the Acts of December 17, 1914 (38 Stat. 785), of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006), and of November 23, 1921 (42 Stat. 227, 298, sec. 1005), declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments, as being within the power delegated to the Congress by the Constitution of the United States?

KIMBROUGH STONE,
United States Circuit Judge.
ARBA S. VAN VALKENBURGH,
United States Circuit Judge.
WILBUR F. BOOTH,
United States Circuit Judge.

Being the Judges who sat in the Circuit Court of Appeals, on the hearing of the case. (Rec. .)

ARGUMENT.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Honorable Associate Justices of the Honorable The Supreme Court of the United States.

I.

NO PENALTY ON PURCHASER.

Section 8 of Article 1 of the Constitution of the United States provides:

> "The Congress shall have power to lay and collect taxes, duties, imports, and excises. * * * but all duties, imports, and excises shall be uniform through the United States."

Section 1 of the Harrison Anti-Narcotic Act, approved December 17, 1914, provides:

> "On and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, shall register with the collector of Internal Revenue of the district his name or style, place of business, and place or places where such business is to be carried on. * * * It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section."

Section 9 of said Act provides that:

> "Any person who violates or fails to comply with any of the requirements of this Act shall on conviction

be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the Court."

We will admit, for the purpose of this argument, that Congress had the power, under the terms and conditions of section 8 of Article 1 aforesaid, to enact section 1 of the Act of December 17, 1914, and to prescribe punishment for violation thereof.

Section 335 of the Criminal Code, being section 541 of Mason's Code, provides:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

It certainly can not be contended that the original Act of December 17, 1914, makes it unlawful to purchase any such narcotic drugs, or fixes any punishment upon the purchaser.

By the Act of February 24, 1919 (40 Stat. 1130), however, Congress sought also to make the "purchaser" of narcotic drugs a violator of the law, as follows:

> "It shall be unlawful for any person to *purchase* sell, dispense, or distribute any of the aforesaid drugs, except in the original stamped package or from the original stamped package."

By Act of November 23, 1921 (42 Stat. 49), the Act of February 24, 1919, *supra*, was reenacted.

Congress failed, however, to designate whether the violation of said Acts should be a felony or a misdemeanor, or to prescribe any punishment upon the "purchaser."

In case of Carroll vs. United States, 267 U. S. 132, Your Honors properly held "That Congress may exercise a relatively wide discretion in classifying particular offenses as felonies and misdemeanors." Judge Wade imposed sentences as for felonies, although the Acts aforesaid do not

specify whether the violator thereof shall be guilty of a felony or a misdemeanor.

In Connally, Commissioner of Labor vs. General Construction Company (January 4, 1926), 46 Sup. Ct. Rep., 126, Mr. Justice Sutherland, at l. c. 127 said:

> (1) "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

It is true that in case of United States vs. Wong Sing, 260 U. S., 18, Mr. Chief Justice Taft held that under the Revenue Act of February 24, 1919, C. 18, Section 1006 (40 Stat. 1130), in order that the person may be liable criminally as a "purchaser" of narcotic drugs it is not necessary that he be of the class who must register and pay the special tax. In that case, however, no appearance was made by Wong Sing, nor was the point raised that the Act of Congress fixes no penalty, so that case is no criterion.

Now, by all process of reasoning, if the "purchaser" of narcotic drugs is neither required to register or pay a tax, how can it be contended that Congress has any authority to make it a criminal offense to "purchase" narcotics?

It is also true that in Stubbs vs. United States, 1 Fed. (2d) 837, the United States Circuit Court of Appeals for the Ninth Circuit held that violation of Act February 24, 1919, is an indictable offense, though Statute imposes no penalty. (Citing numerous cases.) We are unable to find, however, that any such rule was laid down in any of the cases cited.

It is also true that in case of Willsman vs. United States, 286 Fed. 852, the United States Circuit Court of Appeals for the Eighth Circuit affirmed a judgment and sentence imposed upon the "purchaser." In that case, however, the point was not raised that the said Acts do not prescribe any penalty upon the "purchaser."

In the recent case of Reese vs. United States, 14 Fed. (2d) 606, the United States Circuit Court of Appeals for the Sixth Circuit held that said Amendment of February 24, 1919, and November 23, 1921, to be integral part of the original Act of December 17, 1914, and penalties provided in section 9 apply thereto. Mr. Reese acted as his own attorney. He applied to Your Honors for a writ of certiorari, which was denied.

We are still unable to understand how the punishment prescribed for violation of the Act of December 17, 1914, can apply to a "purchaser" of narcotic drugs, first attempted to be made a criminal offense by the Acts of February 24, 1919, and November 23, 1921.

In volume 16 Corpus Juris, pages 68 and 69, section 30, we find this rule:

> "*Necessity to Prescribe Penalty.*—It has been held in some of the cases that where an act is a crime solely by statute, and no penalty is prescribed in the statute, an indictment will be quashed, or the judgment arrested; or in other words, that a description, definition, and denouncement of acts necessary to constitute a crime does not make the commission of such acts a crime unless a punishment is annexed, for punishment is as necessary to constitute a crime as its definition."

In case of Mossew vs. United States, 266 Fed. 18, the defendant was indicted for violating Act of August 10, 1917 (40 Stat. 286), charging him with making an unjust and unreasonable charge for sugar sold at retail. He pleaded guilty, a fine was imposed by the District Court, which he paid. Thereafter, he sued out a writ of error from the

United States Circuit Court of Appeals for the Second Circuit, on the ground that while section 4 of the said Act made certain acts unlawful, no penalty was prescribed for violation thereof. *Held,*

> "A judgment convicting a defendant of a crime for which there is no statutory authority, although entered on a plea of guilty, and a fine had been paid, is void."
>
> "The Federal Courts have no criminal jurisdiction, except of offenses created by the Act of Congress, and for which the punishment is also prescribed by statute."

Thereafter, Congress amended the Lever Act, (being Act of October 22, 1919) attaching a penalty for violation thereof.

II.

HARRISON ACT UNCONSTITUTIONAL.

The Tenth Amendment to the Constitution of the United States, which is a limitation upon the power of the Government of the United States, declares:

> "THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE."

In order to intelligently argue the constitutionality of the Harrison Act will require that we also quote section 2 of the Act of December 17, 1914, which section has been repeatedly construed by the Courts, keeping constantly in mind that Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government.

Section 2 of said Act of December 17, 1914, provides:

> "It shall be unlawful for any person to sell, barter,

exchange, or give away any of the aforesaid drugs, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given away on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * *

"Nothing contained in this action shall apply. * * * (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only." * * *

Section 8 provides that it shall be unlawful for any person not registered under the provision of this Act, and who has not paid the special tax, to have in his possession or under his control any of the aforesaid drugs. * * *

The United States Circuit Court of Appeals for the Ninth Circuit in case of Johnson vs. United States, 294 Fed. 753, held that said section is applicable to only such persons as are required to register under section 1 and does not apply to one who is not engaged in any of the prohibited avocations.

In United States vs. Jin Fuey Moy, 241 U. S., 394, the indictment charged a conspiracy with Willie Martin to have in Martin's possession opium and salts. It further alleged that Martin was not registered with the Collector of Internal Revenue of the District, and had not paid a special tax required; that the defendant for the purpose of executing the conspiracy issued to Martin a written prescription for morphine sulphate, and that he did not issue it in good faith, but knew that the drug was not to be given for medicinal purposes, but for the purpose of supplying one addicted to the use of opium. The District Court quashed the indictment on the ground that the statute did not apply to the case. (225 Fed. 1003.)

Mr. Justice Holmes, in affirming the ruling of the District Court, held that "any person not registered" in sec-

tion 8 can not be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertook to deal—the persons who are required to register by section 1. MR. JUSTICE HUGHES and MR. JUSTICE PITNEY dissented.

In United States vs. Doremus, 249 U. S. 86, the defendant, a licensed and registered physician, was charged with violation of section 2 of Act of December 17, 1914, for unlawfully selling, giving away and distributing five hundred one-sixth grain tablets of heroin without official written order, and selling, dispensing and distributing such tablets not in the course of regular professional practice. The District Court sustained a demurrer to the indictment, for the reason that the Harrison Act is unconstitutional, being only a revenue measure, and an invasion of the police powers reserved to the States. (246 Fed. 958.)

MR. JUSTICE DAY wrote the opinion for the majority of this Court in which he reversed the ruling of the District Court.

MR. CHIEF JUSTICE WHITE wrote the dissenting opinion in which he held that the District Court "correctly held the Act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved powers of the States," in which opinion MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE MCREYNOLDS concurred.

Our Mr. Linquist thereupon filed a petition for rehearing, which was overruled.

In Webb and Goldbaum vs. United States, 249 U. S. 96, Dr. Webb was a practicing physician and Mr. Goldbaum a retail druggist. They were convicted and sentenced on the charge of conspiracy to violate the Harrison Act. The United States Circuit Court of Appeals for the Sixth Circuit certified three questions to this Court.

Our Mr. Lindquist, by leave of court, filed a brief as *Ami-*

cus Curiae in which he quoted from Hammer vs. Dagenhart, 247 U. S., l. c. 273; Hyde vs. State, 131 Tenn. 208; In the matter of Yun Queng, 159 Calif. 508; Meffert vs. The State Board of Medical Registration and Examination, 66 Kan. 710 (certiorari denied 195 U. S. 625), section 1 Chapter 2 of Bierly on Police Power—State and Federal, and Blunt vs. United States (not reported officially) in which the United States Circuit Court of Appeals for the Seventh Circuit held section 2 unconstitutional, in that—"this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the States."

This opinion was concurred in by Circuit Judge Kohlsaat, but he died before the opinion was filed. A petition for a rehearing was filed by the United States Attorney, which must have been sustained after the filing of the opinions in the Doremus and Webb cases in this Court, because the official opinion is not reported.

This Court answered question 1—"Does the first sentence of section 2 of the Harrison Act prohibit retail sales by druggists to persons who have no physician's prescription, who have no order blank therefor and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued?"—in the affirmative.

Question 2—"If the answer to question 1 is in the affirmative, does this construction make unconstitutional the prohibition of such sale?" was answered in the negative.

Question 3—"If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?" in the negative.

Mr. Chief Justice White, Mr. Justice McKenna, Mr

JUSTICE VAN DEVANTER, and MR. JUSTICE MCREYNOLDS dissented for the same reasons as in the Doremus case.

In Jin Fuey Moy vs. United States, 254 U. S. 189, the plaintiff in error was indicted, tried and convicted for violating section 2 of the Harrison Act. MR. JUSTICE PITNEY, speaking for this Court, affirmed a judgment and sentence.

In United States vs. Balint et al, 258 U. S. 250, the defendants were charged with violation of the Act of December 17, 1914. The District Court sustained a demurrer and quashed the indictment. MR. CHIEF JUSTICE TAFT reversed the ruling of the District Court.

In United States vs. Behrman, 258 U. S. 280, the indictment charged violations of the Harrison Act. The District Court sustained a demurrer to the indictment. MR. JUSTICE DAY, speaking for the majority of this Court, held that the acts charged in said indictment constitute an offense within the meaning of the Harrison Act. MR. JUSTICE HOLMES, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS dissented.

In Linder vs. United States, 268 U. S. 5, the defendant, a licensed and registered physician, was charged with violations of the Harrison Act in that he did knowingly, wilfully and unlawfully sell, barter, and give to Ida Casey a compound, manufacture, and derivative of opium not in pursuance of any written order from her on a form issued for that purpose by the Commissioner of Internal Revenue; that the defendant was a duly licensed physician and registered under the Harrison Act; that Ida Casey was a person addicted to the habitual use of morphine and cocaine and known by the defendant to be so addicted; that she did not require the administration of either morphine or cocaine by reason of any disease other than such addiction; that the defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to Ida Casey by the defendant or

any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by Ida Casey in the presence of the defendant, but that all of the drugs were put in the possession or control of Ida Casey with the intention on the part of the defendant, that Ida Casey would use the same by self-administration in divided doses over a period of time, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the craving of Ida Casey therefor if consumed by her all at one time; that Ida Casey was not in any way restrained or prevented from disposing of the drugs in any manner she saw fit and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving and were adapted for consumption.

Mr. Justice McReynolds, after a careful review of all the previous rulings, reversed and remanded said cause for a new trial, all the Justices concurring, for the reason—

> "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the States, is invalid and can not be enforced. (Cases cited.)
>
> "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government." * * *
>
> "The narcotic law is essentially a revenue measure and its provisions must be applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment sufficient to show that petitioner has done anything falling within definite in-

> hibitions or sufficient materially to imperil orderly collection of revenue from sales. Federal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable."

In the subsequent case of Boyd vs. United States, 46 Supreme Court Reports 442, the indictment contained thirteen counts charging violations of section 2 of the Harrison Act. Counsel for Dr. Boyd, for some unaccountable reason, did not attack the constitutionality of the Harrison Act. The case was submitted to the jury on the question whether Dr. Boyd issued the prescription in good faith, in the course of his professional practice. He was convicted on six and acquitted on seven counts of the indictment. The United States Circuit Court of Appeals for the Fifth Circuit, affirmed the conviction.

Mr. Justice Van Devanter, very properly affirmed the judgment and sentence upon Dr. Boyd, no constitutional questions having been raised.

That it is the duty of Your Honors to declare the Harrison Act, or any other Act in contravention of the Constitution of the United States null and void, is clearly settled in case of Adkins et al, Minimum Wage Board of the District of Columbia vs. Children's Hospital, 261 U. S. 525, in which Mr. Justice Southerland at l. c. 544, said:

> "But if by clear and indubitable demonstration, a statute is opposed to the Constitution, the Court has no choice but to say so, since the Constitution by its own terms is the Supreme Law of the Land, eminating from the people, the repository of ultimate sovereignty under our form of government. A Congressional statute, on the other hand, is the Act of an agency of this sovereign authority and if in conflict with the Constitution, must fall; for that which is not supreme must yield to that which is."

In the subsequent case of United States vs. Daugherty, 46 Supreme Court Reports 156, Your Honors volunteered

the suggestion that the "constitutionality of the Antinarcotic Act, touching which this Court so sharply divided in United States vs. Doremus, was not raised below, and has not been considered. The doctrine approved in Hammer vs. Dagenhart, 247 U. S. 251; Child Labor Tax case, 259 U. S. 20; Hill vs. Wallace, 259 U. S. 44, and Linder vs. United States, 268 U. S. 5, may necessitate a review of that question, if hereafter properly presented."

Although Your Honors in the Adkins case, *supra*, held that it was the duty of this Court to declare any Act of Congress in violation of the Constitution of the United States to be null and void, yet Your Honors failed to say in the Dr. Linder case, *supra*, whether or not the Harrison Act is unconstitutional, although citing a number of previous decisions holding that "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government." Mr. Chief Justice White, Mr. Justice McKenna, Mr. Justice Van Devanter and Mr. Justice McReynolds held the law unconstitutional in the Doremus and Webb cases, *supra*, and there is nothing to indicate that Mr. Justice Van Devanter and Mr. Justice McReynolds (who are still on the Bench) have changed their previous opinions.

Applying the same reasoning to the case at Bar, we respectfully submit that the sole and only power which Congress has, under section 8 of Article 1 of the Constitution, is to levy a tax on the importation and distribution of such narcotic drugs and to provide penalties for failure to pay such tax upon any person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium, or coca leaves or any derivative or preparation thereof, and that the Act of February 24, 1919, and the Act of November 23, 1921, respectively, in so far as they attempt to make it unlawful for any person, other than those mentioned, to "purchase" such narcotic drugs, is in contravention of the Tenth Amendment to the Consti-

tution of the United States, being within the exclusive powers reserved to the States.

We respectfully submit that the plaintiff in error is now and ever since his arrest has been deprived of his liberty contrary to and in violation of the Fifth Amendment to the Constitution of the United States, without due process of law.

In case of State of Minnesota ex rel Whipple vs. Martinson, Sheriff, 256 U. S. 41, this Honorable Court upheld the validity of Chapter 260 of the Laws of Minnesota, 1915.

In conclusion we respectfully submit that if the Harrison Antinarcotic Act is only a revenue measure, and the "purchaser" of narcotic drugs is not required to register and pay a tax, how can it be contended that the Congress has any power or jurisdiction to penalize the "purchases" of such narcotic drugs?

By reason of the premises aforesaid, we respectfully submit that the certified question should be answered in the NEGATIVE, and that the plaintiff in error should be forthwith released from said United States Penitentiary.

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IN THE

Supreme Court of The United States

OCTOBER TERM 1926

No. 898

Certified Question from the Circuit Court of Appeals,
Eighth Circuit

HENRY R. ALSTON,
Plaintiff in Error,

vs.

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Defendant in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1926

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Certified Question from the Circuit Court of Appeals, Eighth Circuit

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HENRY R. ALSTON,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

STATEMENT OF THE CASE

As this case is certified here from the Court of Appeals of the Eighth Circuit, desiring instruction on a particular question, we presume that only such statement of the facts is necessary as will inform this Court in a general way of how the matter arises.

Alston was indicted in a District Court in three counts for purchasing narcotics not in a stamped package as required by the amendments of 1919 and 1921 to the so called Harrison Narcotic Act. He pleaded guilty and was sentenced to a term of imprisonment in the Penitentiary at Leavenworth.

Threafter, and "within due time", as certified by the Circuit Court of Appeals, he sued out a writ of error to that

court and his case was there heard and considered. The Court of Appeals was of the opinion that a proper determination of the issues before them involved the question of the constitutionality of the Act of December 17, 1914 known as the Harrison Narcotic Act and of the amendments thereto contained in the Revenue Acts of 1919 and 1921, and thereupon ask an answer to this question:

> "Are the Acts of December 17th, 1914, (38 Stat. L. 785,) of February 24, 1919, (40 Stat. L. 1130,) declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments, as being within the power delegated to the Congress by the Constitution of the United States?"

This brief undertakes to discuss the case only so far as will bear on the question thus certified.

BRIEF AND ARGUMENT

The Circuit Court of Appeals has set out in its certificate the language employed by the Supreme Court in the case of *The United States* vs. *Dougherty*, 269 U. S., 360, and it is unnecessary for us to repeat it here.

The impression produced on the minds of the Judges of the Circuit Court of Appeals by that language, was produced also on the minds of the Bar generally, and on the minds of many trial judges and appellate courts. Taken in connection with the dissent of four Justices of this Court in the case of *Doremus*, 249 U. S., 86, and fortified by the conviction that has long been strongly rooted in the minds even of many prosecuting attorneys, it is impossible for us to understand it otherwise than as amounting at least to an expression of grave doubt on the part of this court.

The language used was, of course, *obiter* in the *Dougherty* case, but so far from weakening its force, that fact emphasizes it and can only do so. Though arising under the Narcotic Act, the question at issue in the *Dougherty* decision had nothing to do with the validity of the act. It related only to the effect of the sentence. We can only understand the Court as intending, in the language quoted, to exclude a conclusion. It was not necessary to say it. It is elementary law that the decision rendered in the *Dougherty* case did not bear at all on the present question. Unless the Supreme Court desired, out of an excess of caution, to save the question, there can have been no reason for what was said.

We, therefore, understand and can only understand the language as an invitation and permission to the Bar to propose a re-examination of the ruling in the *Doremus* case. So understanding it, we shall present our views candidly and with an earnestness and diligence worthy of the magnitude of the question and the far-reaching consequences that may be involved. And, first, we invite attention to the case of

VEAZIE BANK VS. FENNO, 8 Wall., 533.

This case arose under the acts of March 3d, 1865, and July 13th, 1866, imposing a tax on bank notes. In the report of the case it is said that only two questions are made.

1st. Is the tax a direct tax and therefore subject to the rule of apportionment?

2d. It it an impairment of a state franchise?

Both questions were resolved in the negative. Mani-

festly therefore the case has no bearing on the present issue. In Bailey vs. Drexel Furniture Co., 259 U. S., 20, the court states the questions in a slightly different form at page 40, where, after briefly mentioning the first contention, it quotes from the Veazie Bank case itself, as to the second contention, the suggestion that the tax was claimed to be so excessive as to indicate a purpose to destroy the franchises. The difference in the two methods of statement is not material. The Veazie Bank opinion is quoted as saying:

> "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, *for that reason only,* (italics ours), be pronounced contrary to the Constitution."

And this was nothing more than a restatement of the celebrated dictum of Mr. Chief Justice Marshall in McCullough vs. Maryland, (4 Wheat., 431), that "the power to tax involves the power to destroy."

In connection with the ruling it is to be observed that the court added this saying:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power, **** if (it were) exercised for ends inconsistent with the limited grants of power in the Constitution."

And this saying is quoted and adopted in the Child Labor Tax case in 259 U. S., at page 41, and this is the "doctrine" referred to in the language we have quoted from the Daugherty case.

McCRAY VS. U. S., 195 U. S., 27.

In this case, decided in 1903, Congress had imposed a tax of 10 cents a pound on oleomargerine colored in imitation of butter, and the Supreme Court was asked to set it aside on like grounds; that is to say, that it was so excessive as to destroy the business. The court again held that where it was within the power of Congress to levy an excise, the courts could not question the propriety of a lawful tax merely on the ground that it was excessive. The case was discussed and its meaning carefully delimited in the Child Labor Tax case in 259 U. S., at page 42, where it was said to involve the same principle as Veazie Bank vs. Fenno. As to both these cases it was said in the Child Labor Tax case:

> "In neither of these cases did the law objected to on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."

Here again is the "doctrine" referred to in the passage we have herein quoted from the Daugherty case.

What is that doctrine as here stated? It is plainly this, that where a tax is levied for the purpose of enforcing regulations made by Congress, which are state concerns and, therefore, beyond the power of Congress to make, the tax is void and the law violated, notwithstanding the power of Congress to tax, and for the reason that it is not a tax for revenue but a tax to coerce obedience to a law that Congress had no power to enact.

And it will be well here to recall that, in the McCray case itself, the court said:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

FLINT VS. STONE TRACY CO., 220 U. S., 107.

This case involved the corporation excise tax. It raised the same question that was decided in Veazie Bank vs. Fenno, and was decided the same way. Of it the court said in The Child Labor Tax case:

> "There was not in that case the slightest doubt that the tax was a tax, and a tax for revenue: but it was attacked on the ground that such a tax could be made excessive, and thus used by Congress to destroy the existence of state corporations."

Thereupon, observing that the court gave the same answer as was given in the cases of the Veazie Bank and McCray, it was said,

> "It is not so strong an authority for the government's contention as they are."

In fact, the tax was so obviously a legitimate excise, with no concealed purpose, that the case is hardly of importance enough to refer to, and is only mentioned here because it was relied on by the Government in the Child Labor Tax Case and discussed by the Court in that opinion.

THE DOREMUS CASE, 249 U. S., 86.

Because the soundness of the Doremus case is the very question here, and because we understand that we are at liberty to discuss it *de novo*, we do not here give any special consideration to what was there said. Let it be noted, however, that, although it was there held that the act was valid, four justices dissented on the ground that the act invaded the reserved powers of the states. And examination of what was ruled, as well as what was said of it in the Child Labor case, leaves it exceedingly doubtful whether the full question now for consideration was before the court at all.

DISCUSSION OF THE FOUR CASES NAMED.

No doubt there are other decisions, many of them, that deal with the taxing powers of Congress. But these are the principal cases and go further in the direction of sustaining the principle which we say was involved in the Narcotic Act than any others. To those who have not given them a critical examination they have given the casual impression that they amount to a holding that Congress can accomplish any purpose under the guise of a tax. The most casual study, however, shows such is not their meaning, and that even these cases themselves, in language we have quoted above, clearly foreshadow the later holdings that began in the Dagenhart case, and which we are invoking here, to the effect that it is not competent for Congress to exercise the powers and functions of a state, and enforce its will to do so under a pretext of taxation.

We turn, therefore, now to those later cases wherein the court not only refused to sanction such encroachments, but deliberately made it clear that they will not and can not be

permitted. And the first of these is

HAMMER VS. DAGENHART, 247 U. S., 251.

This was the case in which Congress, under the claim of regulating commerce among the several states, prohibited the shipment from state to state of goods produced by child labor or in a factory where child labor was employed.

It would be useless to pursue in detail the reasoning of the court. It will be sufficient here to quote as follows:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture." Pages 273 and 274.

And the court added to this

> "The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states by the 10th Amendment to th Ceonstitution."

From the Veazie Bank case and the McCray case we quoted language announcing this "doctrine" in the abstract. Here we have it in the concrete, and this is the very "doctrine" referred to in what we quoted from the Dougherty case. It is obviously unnecessary to discuss the case more fully.

THE CHILD LABOR TAX CASE, 259 U. S., 20.

The court having held that Congress could not interfere

with local policies or control the states by using its commerce power to coerce those policies, the Congress attempted to do exactly the same thing by the use of the taxing power. In the resultant litigation the court said that the case can not be distinguished from Hammer vs. Dagenhart, and that Congress was now undertaking in the name of a tax to control the policies of the state, an attempt that *"must be equally futile."*

HILL VS. WALLACE, 259 U. S., 44.

This was the Grain Futures Act. It was conceded that future trading on an exchange was not interstate commerce. It followed that Congress could not control or regulate it. Therefore, when the act imposed a tax upon all grain sold in that way, and exempted from its operation all who would comply with regulations prescribed by Congress, but which Congress had no right to prescribe, the case fell, of course, within the condemnation of the Child Labor Tax case. The result was inevitable and the "doctrine" was again repeated.

LINDER VS. THE UNITED STATES, 268 U. S., 5.

The importance of the Linder case does not arise so much from the fact that it grew out of the same act now considered, as it does from this, that it tersely and clearly formulates and states the "doctrine" referred to in the Dougherty case.

> "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government."

ANALYSIS OF THE ANTI-NARCOTIC ACT.

The Harrison Act is much more clearly within the "doc-

trine" in question than the other cases cited. For it does not merely, as they did, prescribe "detailed specifications of a regulation of a state concern and business," and seek, as they did, "to promote the efficacy of such regulation" by taxing those who will not comply, but, going far beyond such scheme, it imposes a tax and punishes those who do not pay it, and yet in terms *forbids the right to pay it.*

In the Child Labor Tax case and in the Grain Futures case, the law at least made it possible to pay the tax and thereby escape the penalty. In the Narcotic Act it imposes the penalty where the tax is not paid, but forbids the payment.

Passing by, for the present, certain specific infirmities in the act, we invite attention first to the chief features of its general scheme, and we can not do so better than by reducing its provisions to their simplest terms. Leaving out all verbal repetitions and multiplications of words, and all provisions that do not affect the principle involved, here is the scheme of the act under which, for more than a decade, the courts of the United States have been called upon, in countless cases, to deal with evils that are committed by our system of government to the exclusive control of the several states.

> Sec. 1. Every person who deals in, dispenses, or sells narcotics shall register with the Collector of Internal Revenue his name and place of business, and pay a special tax of one dollar per annum.
>
> Sec. 2. It shall be unlawful for any person to sell narcotics except in pursuance of a written order by the buyer on a blank form issued by the Commissioner of Internal Revenue and sold by the Collector at 1 cent each, but the collectors shall not sell such form to any

person except those who have registered and paid the special tax.

The scheme of the act is obvious. It needs nothing but its own terms to reveal its purpose. The prohibition it involves is most desirable. The evil it is aimed at is most grave. But it is not a matter for Congress. It is as much a matter for the states to regulate as were the evils of intoxicating liquors.

The Volstead Act was impossible until there was a constitutional amendment. But, if the Harrison Act is valid, why was it necessary to amend the Constitution in order to prohibit intoxicants? Why could not Congress have enacted as follows?

Sec. 1. No person shall sell intoxicating liquors to an habitual drinker unless such drinker has registered with the Collector of Internal Revenue and paid a tax of one dollar.

Sec. 2. No habitual drinker shall be permitted to register and pay the tax.

We have no spirit of levity or purpose to engage in ridicule in suggesting the following supposititious law, but present it as being exactly parallel in every respect.

Sec. 1. Every person engaged in the business of selling pistols, safety razors, golf sticks or mustache cups, shall register his name and place of business with the Collector of Internal Revenue and pay a special tax of one dollar.

Sec. 2. No person shall sell pistols, safety razors, golf sticks or mustache cups, except in pursuance of a written order from the buyer on a form issued in blank by the Commissioner of Internal Revenue and sold by the Collector at 1 cent each.

> Sec. 3. The Collector of Internal Revenue shall not sell or furnish these blank forms to anybody except he be a registered dealer who has paid the special tax.

But why resort to so much verbiage? It would be a shorter and simpler plan in dealing either with whiskey or narcotics, and would accomplish exactly the same result, to write the law thus:

> Sec. 1. No person shall sell either whiskey or narcotics unless he has registered with the Collector of Internal Revenue and has paid a special tax, and shall not sell to any person who is not also registered, and no person shall be permitted to register or pay the tax except regular dealers in such goods.

If the present narcotic act is valid, such an act as is here suggested would be valid also, and no amendment to the Constitution would be necessary.

But why resort to indirection? It would be far shorter and simpler to say:

> "The buying and selling of whiskey and narcotics shall be held and deemed to be unlawful, and any person so engaged shall be punished by fine and imprisonment."

In short, we submit that it is the manifest purpose of the Act to prohibit the sale or furnishing of narcotics to anybody except dealers (subject, of course, to a few cases, closely guarded, where physicians dispense or prescribe it). That this purpose is accomplished under the guise of a tax comes to nothing. Congress, of course, has the authority to lay and collect excises for the purpose of paying the public debt and of promoting the general welfare within its

authorized powers, but it has no such power for the purposes intended by this act. And such is the clear declaration of the Supreme Court in the Child Labor Tax case and in Hill vs. Wallace.

It is quite true that, in those cases, the court pointed, as evidence of the purpose in view, to the excessive rate of the tax, and that in the present case the tax goes to the other extreme and, instead of being excessive, is absurdly small.

But the tax was not held invalid in those cases because of its excessiveness. In Veazie Bank vs. Fenno, in the McCray case, and in Flint vs. Stone Tracy Co. it was distinctly ruled that the courts could not condemn a tax for being too large. And the court did not, either in the Child Labor case, or in the Grain Futures case, hold the tax illegal because it was excessive. The excessiveness was pointed to as evidence, and not as a vice. *It was evidence that the tax was not intended to be collected at all.* It was a severe penalty imposed on those who would not comply with unauthorized regulations in the tax act.

In the Narcotic case the smallness of the tax is not a vice. But it is evidence of what the real purpose of the act was. It was not, like the other cases, intended to discourage the thing that it taxed. It was worse. It did not say to the user of narcotics, "You shall pay a heavy tax if you do the things we are seeking to prevent." It approached the subject with cynical directness, and said, in effect, "You shall not do what we are seeking to prevent, unless you pay a ridiculously small tax, and you shall not pay the tax."

It is hradly possible to imagine a case in which a statute more obviously carries its death wound in its own face.

OTHER INFIRMITIES IN THE ACT.

The exceptions provided in Section 2 are elusive in character. By the first it is provided that the act shall not apply to the direct dispensing of the drug by a physician to his patient, provided the physician keeps a record thereof. This exception has always been to the writer a puzzling thing. It contains no affirmative legislation. It neither commands nor prohibits. It simply excepts, and excepts upon a condition. The condition is not a command. If there is any prohibition here at all, directed to physicians, the prohibition is not in the exception (a). To find it we must go back to the beginning of Section 2 and find the prohibition in the words "sell, barter, exchange or give away." And this raises the interesting question as to how one would classify the act of a physician in ministering to his patient. If he administers castor oil, we could hardly say that he is "bartering" or "exchanging." But is he "selling" it? Is he "giving" it away? If he renders a physician's bill for his services, does this constitute his act in administering the oil a selling? If he renders no bill at all, is he giving it away? It seems not unreasonable to say that his act is not described by either of the words in the prohibition. It is a "dispensing." If I serve my client for a fee, and in the course of my work I use my paper and my stamps, am I selling them to my client or giving them away?

To this it will be replied that Section 1 uses the word "dispense." Quite true; but it does not prohibit the "dispensing." It merely requires the "dispenser" to register. Let us suppose, then, that a physician, intending to "dispense," registers and pays the tax. Suppose, then, that he dispenses to a delirious patient a quarter of a grain of morphine. What part of the act has he broken? Clearly none,

unless the merciful act of "dispensing" can be said to be either selling or giving away. For the exception does not prohibit or command. It does not even require the keeping of the record. That is left optional. He could not be indicted for failing to keep this record. That requirement is a privilege that, if exercised, excuses the selling.

Perhaps it may be said that this line of argument is captious, or that, at best, it is addressed to the meannig of the act, rather than to its validity. If we had nothing else to go on but the act itself, that would sound like a fair criticism. But we have something else. We know that, in their zeal for its enforcement, the narcotic officers of all grades have put an interpretation on this exception (a), and that the courts have followed it in thousands of cases, under which a physician, duly registered and who has paid the tax, is haled into court for dispensing morphine to a patient without keeping a record thereof, and this, although the act does not forbid the dispensing.

In its practical application this is a clear case of prohibiting a physician from giving his patient a dose or two of morphine without keeping a record of his professional acts. And let it be noted that this has no relation to the enforcement of a tax. There is no tax on that act. The physician, who dispenses must register, must pay a special occupation tax, can get his morphine only on a taxed form. But he has done all these things. What purpose is to be subserved by requiring him to keep a public record of his professional practice? Clearly none.

And yet it will be answered that this record is necessary in order to enable the government to find out what he does with the morphine he purchases under his order forms. To this we reply that that is no concern of the government.

If he registers and pays his tax, and pays for his order forms, what right has the government to ask what he does with his morphine?

In answer to this, we will be referred to this language in the act:

> "It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

We agree that the purpose of the requirement that a physician shall keep a record of his dispensing is to provide a means for determining whether this prohibition is violated. By this means the government officers can tell what he does with it and whether he practices medicine in violation of profession ethics or used it otherwise than in a lawful business. But what concern is it to the United States what he does with his morphine? This aids in no way to collect the special tax. There is no tax on the morphine or on the sale of it. It is perfectly clear that the prohibition last quoted is nothing in the world but an attempt to regulate the practice fo medicine and keep morphine away from addicts. Admirable purposes! Desirable ends! But so would it be to prevent and punish murder, burglaries and arson, except that these are matters reserved to the control of the states.

THE CASE OF JIN FUEY MOY.

Without taxing the patience of the court by an elaborate discussion of exception (b) to section 2 of the act, which is

equally as elusive in meaning as exception (a), we observe that the reasoning in the case of Jin Fuey Moy, 225 F. R., 1003 and 241 U. S., 394, goes far to sustain our contention by its analogies.

The Supreme Court did not in terms say that Section 8, if construed to apply to all persons, would be unconstitutional, but it did say that, so construed, it would "strain the powers of Congress almost if not quite to the breaking point," and ascribes to the Attorney General the remarkable admission that, in passing the act, Congress was seeking, because of the existence of a treaty on the subject, to do exactly what we here contend it was doing, seeking to regulate the traffic, and that, for this reason, Congress

> "gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature."

Jin Fuey Moy Case, 241 U. S., 401.

The official admission is significant, and the Attorney General manifestly was of the opinion that the act would be open to our complaint if it were not for the fact that it could be and was justified under the treaty power, a straw grasped at by the Government but snatched away by the court in this language,

> "The statute does not purport to be in execution of a treaty, but calls itself a registration and taxing act. The provision before us was not required by the Opium Convention."

Though the court thus denied to the Government the consolation sought, it did avoid holding Section 8 unconsti-

tutional by the ruling that Section 8 was not intended to apply to all persons, but only to those who were required by the act to register and pay the tax. The conclusion is irresistible that, if Section 8 did apply to all persons, it was beyond the power of congress to enact. If this is true, how much more true is it that the whole act being a mere effort to regulate a matter of state police, is void.

Judge Thompson, of the Western District of Pennsylvania, from whose judgment the case was taken in error, was less tender in his expressions and very clearly indicated the view that, construed as applicable to all persons, that act

> "Would perhaps violate the provisions of the Constitution of the United States."

225 Fed. Rep., 1004.

THE INVALIDITY GOES TO THE WHOLE ACT.

It will, of course, be contended that the taxing part of the act, including the requirement of the order forms, is within the power of Congress, and that, if the requirement as to the order forms is valid, the requirement that duplicates be kept for examination is a proper adjunct, useful and necessary in enforcement of the tax.

We desire to discuss the case on that plane of candor that is worthy of the magnitude of the question, and we agree that, if the premise is sound, the conclusion follows.

That is to say, if the act is valid in so far as it requires the use of the forms, the provision is valid that requires their preservation by duplicates.

But we deny the premise.

The principle is elementary and needs no citation of authority, that, where an invalid provision in an act is unconstitutional but is separable, its invalidity does not necessarily affect the entire act. Such we assume would be the case with Section 8. Had that section been construed as applicable to all persons and therefore invalid, it could have easily been separated. It was not only a complete entity in itself and physically disconnected with the balance of the act, but it was, by its very terms, a mere rule of evidence. Its prohibitions could be eliminated without affecting the general scheme.

Quite the reverse is the provision we have chiefly discussed. It is not only interwoven with other matters, but so ingeniously and intricately interwoven as hardly to be discoverable from a mere reading. Not only is it thus interwoven with the revenue features so as not to be capable of physical separation; not only is it so important a feature as to make it impossible for a court to say that Congress would have enacted the law without it; but it is far more than that.

It is the very gist and obvious purpose of the act. Of course a court can not say that Congress would have passed the act without it. It is worse. The courts can and should see and declare that, without it, Congress would never have even considered such an act.

In this connection it is to be recalled that the Child Labor Tax Act was, in terms, declared wholly invalid, and that if the Grain Futures Act was not expressly so declared, the language of the opinion leaves no alternative but to so understand it. Certainly the revenue portions were so de-

clared. And we invite special attention to the fact that, in the Grain Futures Act, Congress had expressly provided that the infirmity of one portion of the act should not invalidate the rest. Commenting on this provision the Supreme Court said that the invalid section "is so interwoven" with the rest "that they can not be separated."

Further pursuing the command of the saving clause, the court said,

> "Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court."
>
> *Hill vs. Wallace*, 259 U. S., 70.

SPECIAL CONSIDERATION OF THE AMENDATORY ACTS.

The amendments of 1919 and 1921 were included in the Revenue Acts of those years. Had they appeared there as independent enactments, they might be earnestly supported as *bona fide* excise taxes legitimately imposed in the exercise by Congress of its undoubted power under the first enumerated grant in the Constitution. But they appeared there expressly as amendments to the Act of Dec. 17, 1914. Not only so, but it is reasonably certain that unless the penalty for their violation is to be found in that act, there is no penalty prescribed at all. The indictment and sentence in this case profess no other authority than such as may be found in the Act of 1914.

We take it to be recognized law that where an act of Congress is unconstitutional and void, and must fall for

that reason, it necessarily drags down with it every attachment that is tied to it. An unconstitutional law is no law, and therefore the amendment must fall because there was nothing to amend by.

IN CONCLUSION.

We repeat that the purposes of the Act are good. Possibly its operation has been good, though, after having prosecuted under it for seven years, the writer of this brief gravely doubts whether its effects have not done more harm in further encouraging the tendency of the states toward atrophy in their proper functions, than it has done good by the prevention of narcotic addiction. This is a consideration that may perhaps have no proper place here, either in favor of holding the statute good or holding it bad. Questions of policy have, of course, no proper place in considering matters of constitutional authority. But they do insinuate themselves into the human mind, and in a great matter of a public evil like narcotic addiction, the greatest of intellects may be somewhat beguiled by the magnitude of an evil, even as the most unimportant mind may find its logical processes misled by the thought that the assumption of a power by Congress inevitably tends to make the states evade their burdens.

It is a tempting field of thought, but one which we frankly admit is illogical either way.

What we do say is this, that there are few duties on a court that seem to us more imperative than the duty to pronounce invalid every act of Congress that trespasses beyond the charter of its authority. The curbing of unwarranted efforts after power is just as vital to our institutions as the vindication in all its vigor of the authority that is delegated.

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